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SOME OF THE RESPONSIBILITIES OF OUR STATE AND LOCAL BAR ASSOCIATIONS.

The ability of the bar, in some of our large cities, to purge itself of unscrupulous members, has been demonstrated of late but there is yet much room for improvement. The conviction of Abe Hummel, of New York, was a long step in the right direction and Mr. Jerome is entitled to as much, if not more, credit for this moral victory than that which put a check on gambling in New York.

The complacency with which unscrupulous lawyers have been tolerated in our cities for years is hard to account for; but the reports are showing an increased number of disbarment proceedings. While this fact is to be rejoiced over, the good work needs pushing all over the land till the best element of our lawyers shall control in every city and town. In the smaller cities and towns very little if any work has been done in this line of reform, and yet there is a larger proportion of corrupt attorneys in these places than in the larger cities, and no effort is made in the smaller places to get rid of this obnoxious class.

The general welfare of the whole country depends more upon its lawyers than any other class, for they are the law-makers. It follows, "as the night the day," that it is of the greatest importance that our lawyers should be men of the highest integrity. For many years our legislatures have been overcrowded with men who seem to have considered their chicanery so laudable a thing as to openly boast of it. There are large numbers of the country lawyers who deplore the existing conditions, and yet they are slow to follow the efforts of the bar in the larger cities to get rid of the vampires who not only disgrace the bar, but for some unaccountable reason find their way into our legislatures and even to seats on the bench. The best class of the country lawyers can not afford to leave their business to go into the legislatures, because the pay is too small to tempt them and they are too honest to make a job of the office, yet, nevertheless, they owe a duty to their profession as well as their country, to form bar associations, one of the objects of which is to enforce vigorous rules against unprofessional conduct; another, to require a strict examination both as to the competency and the integrity of the candidate for admission to the bar or any office of public trust.

The state bar should put forth its best efforts to bring about these much needed reforms. Some efforts are being made along these lines in many of our states, but they lack the vigor and continuity which the necessity requires. The bar associations are not half realizing the power for reform which lies in them. They have been pursuing that shilly shally course which is satisfied with allowing things to remain as they are, rather than go to the trouble which a reform movement means, if it is to mean anything. We are speaking generally and do not mean to say that all the bar associations are not on the alert to do needful things; yet, even the best of these are but giving earnest of what may be done. The state bar associations ought to foster the building up of bar associations in every county at least, and secure thereby the greatest interest in the state associations. There should be an effort made to secure salaries to the representatives which would make it worth while for abler lawyers to accept the nomination for these offices. More may be done by the bar associations, to bring about a good order of things in our legislatures, than by any other agency.

This agency should also be much more active than it has been in the selection of the judiciary and in securing legislation to increase the number and quality of the judges on the supreme and appellate benches. Our best talent can not afford to accept judicial positions while the salaries in most of our states remain as they are. It is the fault of the bar if relief is not given to those higher courts in those states where the work of opinion writing is behind.

Then there are the vampires, the bloodsuckers, the ambulance chasers, that ilk of the profession, compared to which the most degraded criminals are gentlemen; the vultures, who snatch the bread from the mouths of widows and orphans; who prey upon human society even to the dividing asunder of the most holy relations of life, un-

fathering children and contaminating with their unhallowed touch the purest virtues of womanhood; who, with eager eyes gloat over the mangled body of the victim of some unfortunate accident as visions of contingent compensation cross their mental vision in the contemplation of the coveted professional employment which they expect to secure when the unfortunate victim at last opens his eyes; who sneer at professional ethics and have no thought or care for professional esteem or regard. How long will such men be tolerated! How long will the profession be compelled to hang its head and admit the disgrace of their association!

Appellate courts, in numberless instances, have expressed a willingness to render every possible service in purifying the profession, if the bar will undertake to prosecute the charges. Disbarment, suspension, and severe social and professional ostracism, are the most effective remedies for the men of this type already in the practice, and severe examination by the supreme court or one central body, composed of men of high position and prominence in the profession for all who knock at the door of the profession for admission will effect wonderful changes in raising higher the standard of the profession.

NOTES OF IMPORTANT DECISIONS.

FIRE INSURANCE—IMPLIED WAIVER OF PROOFS OF LOSS.—A waiver of conditions in a policy requiring notice and proof of loss may be express, or may be implied from acts and conduct of the insurer evidencing a recognition of liability, or from a denial of obligation exclusively for other reasons than the insufficiency or entire want of such proofs. This rule is well illustrated in the recent case of Burgess v. Mercantile Town Mutual Insurance Co., 89 S. W. Rep. 568, where the Missouri Court of Appeals holds that where, after loss under certain policies, the adjuster of one of the insurers examined the loss, and defendant's agent stated to plaintiff that he had given notice thereof, and shortly thereafter, and within the time required for the filing of proofs of loss, plaintiff had a meeting at defendant's home office with defendant's secretary, at which the negotiations failed only because of a difference as to the value of the property destroyed, after which defendant wrote plaintiff asking him to accept the amount offered, and making no reference to a requirement of proofs of loss, such facts were sufficient to justify a finding that proofs were waived.

The opinion of Nortoni, J., in this case is an interesting exposition of the rule relating to the question of waiver in this class of cases. The learned judge says: "While the matter of waiver is frequently predicated upon the doctrine of estoppel by the courts, and while, as a general proposition, there could be no estoppel, except where the party against whom the estoppel is sought to be invoked is in possession of all of the facts and acts understandingly and intentionally in the matter of waiver of his rights in the premises, it is the generally accepted law on the subject, and the rule is satisfied when one, being in possession of the facts, so conducts himself thereabout, within the time provided in the policy, as would lead a reasonably prudent person to believe that he intended a waiver, whether in fact he intended such waiver or not. It might be difficult, indeed, for one holding the affirmative of the issue to establish that the insurer intended to waive proofs; so difficult that in many instances it could not be done, and substantial justice would thereby be defeated. In such case, the law is satisfied with such a showing of facts pertaining to the conduct of the insurer in and about the loss as would lead a reasonable man to believe that the company did not intend to insist upon the fulfillment of the conditions precedent with regard to notice and proof. As expressed by Judge Sharswood in the case of Beatty v. Lycoming County Mutual Ins. Co., 66 Pa. 9: 'To constitute a waiver there should be some official act or declaration by the company during the currency of the time dispensing with it; something from which the assured might reasonably infer that the underwriters did not mean to insist upon it.' Or, as said by the Kansas City Court of Appeals in Gale v. State Ins. Co., 33 Mo. App. 664: 'If the insurance company so conducted itself as to cause plaintiff, while acting as an honest and reasonable man, to believe that the company would not require a formal proof of loss, so that, relying thereon, and induced thereby, plaintiff permitted the time to elapse within which such proofs should have been made, then the company is precluded from insisting on such proof.' See, also, Summers v. Ins. Co., 45 Mo. App. 46; Okey v. Ins. Co., 29 Mo. App. 105. In accordance with these principles, it is laid down as the law by Mr. Wood, in his work on Insurance (2nd Ed.), § 446, and followed by the courts of this state, as follows: 'When the insurer is informed of the loss by the insured, and without saying anything about preliminary proofs, proceeds to inquire whether the insurance is valid upon a specific ground, independent of those required to be stated in the proofs, and declines to pay the loss upon a specific ground, this operates as a waiver of all objections to the insufficiency or even entire absence of preliminary proofs.' Exchange Bank v. Thuringia (Mo. App.), 83 S. W. Rep. 534; Summers v. Insurance Co., 45 Mo. App. 46. The Kansas City Court of Appeals, in

the case of Okey v. Insurance Co., 29 Mo. App. 105, states the doctrine thus: 'When the insurer, knowing the facts, does that which is inconsistent with his intention to insist upon a strict compliance of the conditions precedent of the contract, it is treated as having waived their performance, and the assured may recover without proving performance.' Gale v. Insurance Co., 33 Mo. App. 664; Underwood v. Insurance Co., 57 N. Y. 500; 2 May on Insurance (3d Ed.), § 507.

From what has been said, and in view of these well-established principles, there can be no doubt of there being substantial evidence of a waiver in the record before us, and the trial court was justified in finding the fact to that effect. The evidence is, that respondent called upon the manager of the company in its home office about two weeks after the fire, when the manager canvassed the loss, and figured thereon for 20 minutes with Mr. Daniels, the Continental adjuster, who had been upon the scene of the conflagration some days before, and no doubt ascertained all the facts which the appellant desired and possibly more than the proof of loss would have conveyed. At least Mr. Daugherty seemed to be satisfied with the facts and so announced, for he finally offered to settle, or in the presence of respondent, ordered Daniels to propose a settlement of $1,000 on defendant's policy, basing his refusal to pay the entire claim, not upon proof or want of notice, but upon the fact that he knew all about the value of the building, and claimed to know more about it than respondent who suffered the loss. At no time did he urge any reason for not settling other than the quantity and value of the loss. As said by the Supreme Court of Connecticut in the case of Rathbone v. City Fire Insurance Co., 31 Conn. 193, and as said in Summers v. Insurance Co., 45 Mo. App. 46: 'He, in effect, said to the insured that it was all right except, only the house was insured for too great a sum, and that the company would pay what it was worth. * * * This was a practical admission of liability, but a refusal to pay the entire amount, mentioned in the policy.' The refusal to settle in this case was based upon the sole and only ground, that the building was not worth the amount for which it was insured. This, of itself, was substantial evidence in a case circumstanced as this one is, of the purpose of the company to waive the requirement of notice and proof of loss. When the attorney for respondent called upon Mr. Daugherty within the time allowed for proofs, he was informed that the company stood ready to settle whenever it could be demonstrated to it that the building was worth the amount for which it was insured, and in fact, in none of these conversations was notice or proof of loss required or even mentioned by Mr. Daugherty. Conduct of this kind on the part of the insurer leading the respondent to believe, as he said in his testimony, that such proofs were unnecessary, continually assuring him that the loss was honest and fair and the only question in differenee was its amount, works an estoppel *in pais* on the company to thereafter deny responsibility on account of the failure to furnish such proofs when the party had been led to believe they were not required, and for that reason, did not furnish the proofs. Exchange Bank v. Thuringia (Mo. App.), 83 S. W. Rep. 534; Summers v. Insurance Co., 45 Mo. App. 46; Okey v. Fire Insurance Co., 29 Mo. App. 105; Rathbone v. Fire Insurance Co., 31 Conn. 193; 2 Wood on Insurance (2nd. Ed.), 446; 2 May on Insurance (2nd. Ed.), § 504."

LIABILITY OF A LANDLORD FOR INJURIES TO A TENANT CAUSED BY DEFECTS IN THE LEASED PREMISES.

The above might be subdivided into several subjects, and in order to discuss the entire field, this article could be extended considerably beyond the space allotted to it, but I have neither the ability nor the desire to treat the entire subject of landlord and tenant in its varied phases. All I intend to accomplish is to call attention to certain conflict which I have recently discovered amongst the cases dealing with the question of the landlord's liability for damages sustained by a tenant under certain circumstances, and to incidentally state what to me seems to be the most logical. It would seem that at this late day there ought not to be any serious dispute amongst the courts upon a subject which may be said to be as old as the law itself, but that it as a matter of fact does exist can be demonstrated, and the reasons why it ought not to exist it will be my endeavor to demonstrate. In considering a legal proposition it is necessary to reason legally, and in order to do this it follows, of course, that it is necessary that the reasoner be familiar with fundamental legal rules and principles, and it is further important that the reasoning commence at the proper point—the beginning.

According to the foregoing it is proper to consider briefly, first, the nature and meaning of the term "lease," and this must not be confused with the term "license." I am not discussing the rights or liabilities of either licensor or licensee. These may be said to be somewhat analogous, but in the main they are entirely separate and distinct from that of lessor and lessee. A lease or demise of premises is a conveyance of a limited estate

therein, less than a freehold.[1] Blackstone puts it this way: "Of estates that are less than a freehold, there are three sorts; 1, estates for years; 2, estates at will; 3, estates by sufferance. An estate for years is created by a contract for the possession of lands or tenements for some determinate period, and it takes place where a man letteth them to another for the term of a certain number of years agreed upon between the lessor and lessee. * * * And because no livery of seizin is necessary to a lease for years such lessee is not said to be seized, or to have true legal seizin of the land. Nor indeed does the bare lease vest any estate in the lessee, but only gives him a right of entry on the tenement, which right is called his interest in the term, or *inter esse termini*, but when he has actually so entered, and thereby accepted the grant, the estate is then, and not before, vested in him, and he is possessed not properly of the land but of the term of years; the possession or seizin of the land remaining still in him who hath the freehold. Thus the word term does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease."

The quantity of this somewhat undefinable interest or estate in the leased premises which is conveyed in a given instance is, of course, to be determined from the language or covenants contained in the lease or contract of hire, and that ends its office with respect to the question under consideration, namely: the right to damages on the part of the tenant, flowing from defects in the leased premises. The existence of additional covenants, with reference to the making of repairs, or the existence of warranties, or the want of them in the lease, make little or no difference as to the liability of the landlord for such damages, and they would have no influence, one way or the other, upon the tenant's right to recover damages due to defects in the premises. Where premises are defective at the time the lease is made and from which defect injury results to the tenant's person or property, or which results in injury to the person of some member of the tenant's family who is upon the premises, because of the lease between the landlord and tenant, the landlord can still not be held liable in damages, as for breach of contract, or upon the contract of lease, even though he covenanted in the lease to make repairs, and this for the very obvious reason that it was not only the tenant's right but his duty to make the repairs himself, if the landlord failed to carry out the terms of his agreement. Where there are defects which are known and visible to the tenant at the time he takes the premises, and nothing is said, it then becomes the tenant's duty to make all necessary repairs, and he cannot even charge them up to the landlord, but where the landlord agrees to make certain necessary repairs, but fails to carry out his agreement, then the tenant is not at liberty to permit injuries to occur, providing he can prevent it, and if he does he cannot recover damages from the landlord. In such cases the tenant is not without remedy. In fact there are several courses open to him, and he has the right to choose which he will take. In the first place he may make the needed repairs himself and off-set the value of the making of them against any rent due the landlord, or he may make the repairs and bring an action against the landlord for the amount which is due him therefor; or he may vacate the premises and treat the contract as broken and recover against the landlord upon the contract in like manner as if he had been wrongfully evicted. But he cannot maintain an action for damages for injuries sustained by reason of defects in the premises, an action sounding in tort, because the landlord was guilty of a breach of his contract. The case of Davis v. Smith,[2] is directly in point on this subject, and many cases are referred to in the opinion. The opinion contains the following:

"A contract to repair does not contemplate as damages for failure to keep it, that any liability for personal injuries shall grow out of the defective condition of the premises, because the duty of the tenant, if the landlord fails to keep his contract to repair, is to perform the work himself and recover the cost in an action for that purpose, or upon a counterclaim in an action for the rent, or if the premises are made untenantable by reason of the breach of the contract the tenant may move out and defend in an action for the rent, as upon an eviction. The tenant is not at liberty, if the landlord fails to keep

[1] McAdam on Landlord and Tenant, Vol. 1, Sec. 47 *et seq.*

[2] (R. I.) 66 L. R. A.

his contract to repair the premises, to permit them to remain in an unsafe condition, and to stay there at the risk of receiving injury on account of the defects in the premises, and then recover as for negligence for any injuries that he may suffer. Where the sole relation between two parties is contractual in its nature, a breach of the contract does not usually create a liability as for negligence. In such case the liability of one of the parties to the other because of negligence is based either on the breach of some duty which is implied as the result of entering into the contractual relation, or from the improper manner of doing some act which the contract called for; but the mere violation of a contract, where there is no general duty, is not the subject of an action of tort." Furthermore, even if the tenant might maintain an action for injuries sustained by reason of the landlord's failure to comply with his agreement, he can still not recover under the circumstances above instanced, because it is the general rule that a person to whom a duty is due from another must make all reasonable exertions to minimize or lessen his loss or injuries,[3] and if this can be done by making the needed repairs himself the tenant must do so if for no other purpose than to prevent damages to increase unnecessarily. Where the landlord retains possession of the portion of the premises in which the defect exists, or if the portion retained is connected with the defective portion, or where premises have been let to several tenants under different leases, so that neither of the tenants has control of the entire estate, or where neither have the right to interfere with or inspect the defective portion, and if injury results to any of the tenants because of such defect, the landlord will be held liable in damages even if the defects were known to or visible to the tenant.

In this connection, it will be observed from the cases, that where premises are let to several tenants, under independent and separate leases, that as to the portion not leased to a tenant, the landlord is deemed to be in possession and control, even if this is not the fact, as between the landlord and the other tenants. It is well settled by the cases, that where the landlord retains control of a portion of the premises, and if injuries result to a tenant by reason of defects in the portion so retained, that then the landlord is liable. An instructive case on this point is the case of McGinley v. Alliance Trust Company.[4] This was an action for damages sustained by a member of the tenant's family, by reason of the negligent construction and negligent failure to repair a stairway in the landlord's possession, but which was used in common with other tenants, by the tenant. In the opinion the court says:

"The plaintiff does not complain of the failure of the landlord to repair that part of the premises which he had leased to her father, but the complaint is of negligent construction and failure to repair the part of the building in the possession of and under the control of the landlord, which it was necessary for her father's family to use in common with all the other tenants, to render the premises her father did lease available for the purpose for which the lease was made. The law on this subject has been discussed in nearly all the courts of England and America, as is shown by the great array of authorities which the learning and research of counsel have enabled them to present in their briefs. Whilst the decisions are not uniform, yet we are satisfied that the summary made by the law writer in 18 Am. & Eng. Enc. 2nd Ed., p. 220, is correct as to the weight of the authorities and right in principle. The rule laid down by the weight of authority is that where the landlord leases separate portions of the same building to different tenants, and reserves under his control those parts of the premises used in common by all the tenants, he is under an implied obligation to use reasonable diligence to keep in a safe condition the parts of the building over which he reserves control." In the case of Kneeland v. Bear,[5] it is said: "Where portions of a tenement building are let to tenants and the landlord retains the exclusive possession of other portions he is bound to exercise common care and prudence in the management and oversight of the portion of the building retained, and if damages are sustained by a tenant by reason of his failure to do so, the landlord is liable therefor. * * * The obligation rested upon the defendant to keep the roof, the possession of which was retained by him,

[3] Lawrence v. Porter, 63 Fed. Rep. 62.

[4] 56 L. R. A. 334

[5] 11 N. D. 233.

in proper repair and condition, so that his tenants would not, through his fault or neglect, be damaged or injured in their person or goods. In this case, as in Tool v. Beckett,[6] a case very similar to the case at bar, the tenants had no right to interfere with the roof, or control of it. The defendant had such care and control for the benefit of himself and all his tenants, and as said by the court in that case, by implication, he undertook so to exercise his control as to inflict no injury upon his tenants. If the landlord does not exercise common care and prudence in the management and oversight of that portion of the building which belongs to his special supervision and care, and damages are sustained by a tenant on that account, he becomes liable for them."[7] As to the portion of the building of which the landlord has the control, he retains all the responsibilities of a general owner to all persons, including the tenants of the building.[8] The authorities on this subject are exhaustively collated in the note to the case of Dollard v. Roberts.[9] On examining the cases it will be observed that this liability of the landlord does not exist because of certain expressed or implied covenants contained in the lease, but the action for such liability sounds in tort, not for breach of covenant, and of course not because of implied deceit, because the defects assumed are visible and known to the tenant, but the suit or action would at common law have been, and is still on the principle of that involved in the old action of trespass on the case, and is on the theory that no one will be permitted to so use his own property or to so conduct himself that he will cause injury or damage to another.

In all such cases it is the duty of the tenant to use all reasonable means at his command to prevent injury, and if he sees impending danger it would be his duty to leave the premises, and his remedy is a suit against the landlord for breach of contract, the measure of damages, in such cases, is the difference if any, between the amount of rent agreed to be paid and the value of the use of the premises, and in case a business has been established, damages to his business, which may include future profits, unless premises equally suitable could have been obtained. In case the tenant does not vacate the premises when he discovers a defect in the portion under the control of the landlord, which may cause injury to him, the jury should determine whether the danger was so threatening and apparent that the tenant should have foreseen the calamity; whether his conduct in not leaving the premises was that of a prudent person, and if it should be found that he did not act prudently in remaining, after he discovered the danger, he should not be permitted to recover damages from the landlord. The question would not be whether the tenant knew of the defect and thereby assumed the risk. This is said to be the reason why no recovery can be had, in some of the cases.[10] But these cases, so far as they hold that the tenant cannot recover because he assumed the risk, are clearly wrong, because there cannot be any question of assumption of risk between landlord and tenant. Assumed risk is connected with and flows from the contract between master and servant, and no such relation exists between landlord and tenant. Furthermore the tenant cannot be said to assume the risk with reference to defects in premises not leased to or controlled by him. The only question by which the tenant's right to recover damages must be tested is: Whether he was guilty of contributory negligence in not moving out when he discovered the danger.

In such cases it would be error to also submit to the jury, the question, whether or not the landlord, although knowing the defect, could reasonably be supposed to have foreseen the danger, because he would be liable for injuries resulting from defects in the premises controlled by him independent of any knowledge of such defects. He would not be liable strictly speaking, in his capacity as landlord, but as the owner of dangerous agencies, and the fact that he may not have known of or anticipated the dangers is no defense, for it certainly is immaterial if damages result from a trespass or wrong whether the wrongful act was committed intentionally

[6] 67 Me. 545.

[7] The following cases are to the same effect: Priest v. Nichols, 116 Mass. 401; Kirby v. Association, 74 Am. Dec. 682; Gray v. Gas Light Co., 19 Am. Rep. 324.

[8] Looney v. McLean, 129 Mass. 33; Jones v. Friedenburg, 42 Am. Rep. 86.

[9] 14 L. R. A. 238.

[10] Cleves v. Willoughby, 7 Hill, 83; West Lake v. DeGraw, 25 Wend. 669; Jaffe v. Harteau, 56 N. Y. 398.

or unintentionally, as long as the wrong is done to another's person or property, who was not at fault. The only question is: Was a wrongful act done or permitted? Did injury result? Was the act committed by the landlord or his agencies, and could it have been avoided by the exercise of proper care? All this is entirely independent of the lease or the covenants contained in it, and even if the lease contained an express warranty against injuries, the suit would yet not be upon the warranty, but would sound in tort, and the basis of the cause of action would be the breach of a duty, and not a breach of warranty. In case the entire premises are let which are defective in construction or otherwise, which fact is known or by the exercise of reasonable diligence could have been known to the landlord, and which is not known to or by the exercise of ordinary care could not have been discovered by the tenant, and if injury results to the tenant or to a member of his family, by reason and because of such latent or hidden defects the landlord is liable therefor. Upon this proposition, however, there is serious dispute and conflict. There is a general doctrine that as between landlord and tenant the maxim "*caveat emptor* applies, and the lessee takes the risk of conditions unless he protects himself by express covenants; that the tenant takes the premises for better or for worse, and cannot complain that they were not constructed differently."[11]

It may be true that in a measure the maxim *caveat emptor* applies between landlord and tenant, but I do not see why it should apply any more between landlord and tenant than between vendor and vendee. If a lease is in the nature of a sale or conveyance of an estate less than a freehold, why should the law say caution lessee or buyer any more in the one case than in the other, and it does not do it. There are no implied covenants in a lease as to the quality or condition of the premises. Neither are there such covenants in a contract of sale of the entire estate. If premises are let for a special and limited purpose, and if this purpose is defined at the time they are taken or let, so that the act of letting them amounts to an implied warranty that they are fit for that purpose, the transaction is rather a license than a lease. In a lease the purpose for which the premises are desired is not necessarily defined, for the tenant has the right to use the premises for any lawful purpose, and consequently, in contemplation of law there cannot be any implied warranties with reference to the usefulness of the premises for a particular purpose, because the lease does not attempt to define or limit the use to which the premises are to be put. The office of the lease is to convey a portion of the estate, nothing more.

There certainly are some implied warranties in a lease, for instance, the lessor warrants the peaceful possession of the demised premises, in like manner as he does in a deed of conveyance, even without express covenants. This would not not be so if the maxim of *caveat emptor* applied in all its rigor. That maxim applies in conveyances by quit claim deeds, for by such deed the grantor does not profess to convey any portion of the estate. He says I convey my right, title and interest whatever that may be, but he does not say by such deed that he has any right title or interest, and the deed does not purport to convey any. For that reason a grantee in such a deed is chargeable with notice of secret equities. The law says: *Caveat emptor*. The same is true of judicial conveyances, but as said before, there is no reason why this doctrine should apply between lessor and lessee.

In the case of Hines v. Wilcox,[12] the Supreme Court of Tennessee lays down the rule that the landlord is liable for damages resulting from hidden defects, which are known or by the exercise of reasonable care could have been known to the landlord, and which are not known or could not with reasonable care, have been discovered by the tenant. In this decision the judgment of the trial court is reversed. The case was again tried upon the theory outlined by the opinion of the supreme court, resulting in a verdict for the plaintiff, and the same judge who wrote the first opinion, wrote the opinion of the supreme court on the second appeal. The second decision is reported in volume 41 L. R. A. p. 278. This reaffirms the former decision in this and a companion case. This decision stirred up a veritable hornet's nest of criticism and op-

[11] McAdam on Landlord and Tenant, Vol. 2, Sec. 385, citing a great many cases.

[12] 96 Tenn. 148, 34 L. R. A. 824, 42 Cent. L. J. 411.

position. At the beginning of a lengthy note in 34 L. R. A. 824, the annotator says this:

"Hines v. Wilcox is a new departure in the law of landlord and tenant. It places a duty upon the landlord which it has not been the rule to put there, and to a large extent relieves the tenant from a duty which has always rested upon him. It makes a general rule of an exception which has only been applied in a peculiar class of cases, which does not include so obvious a defect as existed in Hines v. Wilcox. No active care and diligence to discover defects have generally been placed on the landlord. The general rule is that the tenant must beware. He must examine the premises before taking them, and rely upon his own examination unless he procures a warranty from the landlord of the safety of the premises. The burden of the examination is placed on him and not on the landlord."

If this is the general rule I fail to see any reason for it. But the statements made by the learned annotator are well supported by the cases which he collates in the note. I undertake to say, however, upon the authority of the decision in the case of Hines v. Wilcox, and the cases which it follows, and which follow it, which, by the way, are not commented upon by the annotator, to any great extent, that these numerous decisions which are cited in the note referred to are not law, in so far as they conflict with that of Hines v. Wilcox. These cases nearly all deny the right to recover damages for the reason that there are no implied warranties in the lease. The law is, and the decision in Hines v. Wilcox declares that the right to damages does not depend upon covenants expressed or implied in the lease, but that the action is in tort for deceit; that it is the landlord's duty to disclose to the tenant the existence of known and hidden dangers if he knows that they exist, and if he does not know of them, that it is his duty to make reasonable and seasonable inspection of the premises in order to discover hidden defects and dangers. The purpose of the law is that accidents or injuries to persons or property shall be prevented if possible, and in the very nature of things the landlord has a better right and opportunity to inspect the premises from time to time, than an intending lessee. The object is that the lessee shall be warned so that he may guard against injury, and the landlord must give this warning if he knows of existing dangers, which are not visible to the tenant. And his duty does not end here. It is likewise his duty to inform himself as to the condition of the premises, and if he fails in this he cannot escape liability for injuries resulting from defects and dangers which could have been discovered had he been more vigilant. If ignorence would be a protection, then the more negligent the landlord, the greater his chance to escape liability. In most cases the landlord, who has himself erected the structure in which the defect exists, is perfectly familiar with the weak places in it, and he cannot even claim to be ignorant.

The principal mistake which is made in many cases is that they look to the lease for a basis of a cause of action against the landlord, and here is where the cause for the conflict lies. As said in the opinion in Wilcox v. Hines:[13] "The ground of liability on the part of the landlord when he demises dangerous property, has nothing special to do with the relation of landlord and tenant. It is the ordinary case of liability for personal misfeasance which runs through all the relations of individuals to each other. This liability does not rest upon the theory of an express contract between the owner and the person receiving the injuries, but is predicated upon the obligation which the law imposes on all to so keep and use their property that others using or entering upon it by their invitation, shall not be injured by its improper condition or unfitness. Quoting from Cowen v. Sunderland:[14] "There is an exception to the general rule of *caveat emptor*, as between lessor and lessee arising from the duty which the lessor owes to the lessee. This duty does not originate directly from the contract, but from the relation of the parties and is imposed by law. It is not upon the ground of an insurer or warrantor of condition under his lease contract, but on the ground of the obligation implied by law, not to expose the tenant or public to danger, which he knows or in good faith should know, and which the tenant does not know and cannot ascertain by the exercise of reasonable care and dili-

[13] 100 Tenn. 538, 66 Am. St. Rep. 770, 41 L. R. A. 281.

[14] 145 Mass. 363.

gence." In Kern v. Myll,[15] it is said in an action between tenant and landlord: "The cause of action does not rest upon any covenant express or implied, of the landlord to repair the premises, nor that they were habitable at the time the lease was made; nor does it rest necessarily upon the relation of landlord and tenant. * * * But the cause of action is based upon the maxim that every person must so use his own premises as not to injure others either in person or property. The declaration showed a nuisance when the premises were leased known to defendant and concealed from plaintiff."

It will be noticed that this much referred to case of Hines v. Wilcox does not place the entire responsibility upon the landlord. It lays down the rule that both tenant and landlord must exercise reasonable care to discover the condition of the premises, and it may be suggested that the care required from the tenant will off-set, neutralize and counterbalance the care exacted from the landlord, and that, therefore, logically there could be no liability, but the question whether the defects could have been discovered by the exercise of reasonable diligence, by either landlord or tenant, depends upon the degree or amount of opportunity had by either to discover them, and the greater degree of care is exacted from him who had the greater means to discover the defects. This matter is also referred to in the Wilcox case.

The case of Wilcox v. Hines was followed in Thum Bros. v. Rhodes,[16] holding landlord liable for damages from defects unknown to the tenant without equal means of knowledge. Also in Moore v. Parker,[17] holding landlord liable for failure to inform the tenant of known defective condition. This was all that was necessary under the facts in the case.

The case of O'Malley v. Twenty-five Associates,[18] disapproves the Hines-Wilcox case. This holds landlord liable only for failure to disclose actually known hidden defects. This is especially striking because most of the authorities cited in the Hines-Wilcox case are Massachusetts cases. The case is also disapproved in Franklin v. Tracy,[19] holding landlord not liable for injuries to lessee's property from latent defect in premises, of which he had no actual knowledge.

This bears out what I said at the outset: that there existed certain conflict. Whether I have succeeded as well in demonstrating that it ought not to exist, as I said I would try to do, is of course not for me to say, but I am personally firmly convinced that many courts have gone off on the wrong chute in following the implied warranty theory, and when that would not work out they have erroneously failed to see the true rule of liability, which exists independent of lease, covenant, or warranty.[20]

Wichita, Kan. M. C. FREERKS.

[15] 80 Mich. 530.
[16] 55 Pac. Rep. 264 (Colo.)
[17] 64 Pac. Rep. 975 (Kan.), 53 Cent. L. J. 246.
[18] 178 Mass. 559.
[19] 77 S. W. Rep. 1113 (Ky.).

[20] For a full discussion of the important distinction sought to be made in the common-law liability of landlords, by the case of Wilcox v. Hines, see the full and exhaustive annotation of the case of Peerless Mfg. Co. v. Bagley, 52 Cent. L. J. 387. See also 58 Cent. L. J. 246. In both these annotations the editor supports the decision in the case of Wilcox v. Hines against the otherwise severe criticism of law journals and annotators.

STATUTES—CONSTRUCTION—INCONSISTENT PROVISIONS.

STATE v. BATES.

Supreme Court of Minnesota, October 27, 1905.

Where the first section of a statute conforms to the obvious policy and intent of the legislature, it is not rendered inoperative by inconsistent provisions in a later section which do not conform to this policy and intent. In such case the later provision is nugatory and will be disregarded.

ELLIOTT, J.: The relator was charged with soliciting parties to purchase intoxicating liquors in quantities of less than five gallons in violation of the provisions of chapter 346, p. 626, Gen. Laws 1905. He was arrested and brought before the municipal court of the city of Duluth, and after hearing was held to await the action of the grand jury, and in default of bail was committed to the custody of the sheriff. Thereafter he caused a writ of *habeas corpus* to issue out of the district court, and after a hearing thereon an order was entered refusing to release the petitioner and remanding him to the custody of the sheriff. From this order an appeal was taken to this court under the provisions of chapter 227, p. 296, Laws of 1895.

We are not embarrassed by any controversy about the facts. It is admitted that the relator was legally convicted in the municipal court, and the writ of *habeas corpus* properly discharged, if chapter 346, p. 626, Laws 1905, is constitutional and effective. This is the only question pre-

sented by the record. It is contended by the appellant that the statute is invalid, for the reason (1) that its several parts are so inconsistent and contradictory that the legislative intention cannot be ascertained, and (2) that it violates section 1, art. 3, of the constitution of the state.

The statute is entitled as "An act prohibiting the sale of intoxicating liquors, and for the granting of license for the sale of spirituous and vinous liquors, and providing for a penalty for the violation thereof." Section 1 provides "That whoever on his own behalf or as an agent for others, without having a license so to do as provided for in this act, shall solicit any person or persons, firm or corporation or association not having a license to keep a dram shop or saloon under the laws of this state or to a licensed physician or druggist to buy or contract for the future delivery or to make order for any spirituous or vinous liquors in any less quantity than five (5) gallons or either on his own behalf or as said agent or as an agent for the purchaser make an order contracting for the future delivery of any such liquors to any said person, persons, firm, corporation or association shall be subject to a fine," etc. Section 2 provides that "the board of county commissioners may grant license to persons to act on their own behalf or as agents for others in the sale of spirituous or vinous liquors for future delivery in quantities not less than five (5) gallons to others than those duly licensed to keep a dram shop or saloon under the laws of the state in their respective counties as they think for the public good requires."

To say that the act is drawn with reasonable skill and accuracy would be to use the language of flattery. It is crude in construction and awkward in phraseology, and it is doubtful whether so brief a legislative enactment ever contained more bad grammar or a greater number of verbal inaccuracies. But such defects are not necessarily fatal to the statute, so long as the court, according to the well-known rules of construction, is able to discover the intention of the legislature. "Neither bad grammar nor bad English will vitiate a statute, if the meaning of the legislature can be clearly discovered. Awkward, slovenly, or ungrammatical phrases and sentences may yet convey a definite meaning, and, if they do, the courts must accept it as the meaning of the lawmakers." Black, Const. Law, § 34; Kelley's Heirs v. McGuire, 15 Ark. 555; Murray v. State, 20 Tex. App. 620, 2 S. W. Rep. 757, 57 Am. Rep. 623; Lane v. Schomp, 20 N. J. Eq. 82. The statute must be given the benefit of every reasonable inference. "An interpretation which renders a statute null and ineffective cannot be admitted. It is an absurdity to suppose that after it is reduced to terms it means nothing. It ought to be interpreted in such a manner as that it may have effect, and not be found vain and nugatory." Vattel, Interp. of Treaties (Law of Nations, p. 253); State v. C., M. & St. P. Ry. Co., 38 Minn. 281-293, 37 N. W. Rep. 782; State v. Board of County Comrs. Polk Co., 87 Minn. 325-334, 92 N. W. Rep. 216, 60 L. R. A. 161. In order to render this statute consistent and intelligible, it is only necessary to omit the word "not" from the clause "quantities not less than five gallons" in the second section. There is no doubt of the power and right of courts to thus omit a word, when necessary to render a statute intelligible which as it stands is devoid of sensible meaning. The books are full of cases in which words have been omitted, supplied, or transposed. Moody v. Stephenson, 1 Minn. 401 (Gil. 289); Woodruff v. Town of Glendale, 26 Minn. 78, 1 N. W. Rep. 581; Donohue v. Ladd, 31 Minn. 244, 17 N. W. Rep. 381; McGee v. Board of Co. Comrs., 84 Minn. 481, 88 N. W. Rep. 6; Chapman v. State, 16 Tex. App. 76; Hutchings v. Commercial Bank, 91 Va. 68, 20 S. E. Rep. 950; Bird v. Board, 95 Ky. 195, 24 S. W. Rep. 118; Paxson v. Farmers, 45 Neb. 884, 64 N. W. Rep. 343, 29 L. R. A. 853, 50 Am. St. Rep. 585; Lancaster County v. Frey, 128 Pa. 593, 18 Atl. Rep. 478; Lancaster County v. City of Lancaster, 160 Pa. 411, 28 Atl. Rep. 854; Black, Int. Law, § 37.

But it is contended by counsel that there is no more reason why the court should by construction omit the word "not" from the clause in the second section than supply it in the first section, which would make the section consistent and the statute valid, but render it entirely inapplicable as far as the defendant in this case is concerned. The rule that the part of the act which is later in position in the statute is to be deemed a later expression of the legislative will, and thus repeal a contradictory earlier provision, is usually, although not universally, accepted, but does not rest upon a very satisfactory foundation. It has been criticised by Bishop upon the very substantial ground that, as all the provisions of an act are adopted at the same time, there can be no priority in point of time on account of their relative position. Bishop, Written Law, §§ 62-65. If any inference is to be drawn from mere position, it would seem but reasonable to give the preference to what appears first in order. The draftsman would ordinarily express the dominant idea in his mind in the opening paragraph or section, and what follows would naturally and logically agree with what precedes. "For it is to be presumed," says Vattel, "that the authors of an act had a uniform and steady train of thinking." But it is not necessary to invoke such a presumption in the present instance, as the rule of construction which presumes that what appears last in the act is the latest expression of the legislative will should not be applied where the provision standing first in the act is more in harmony with the other statutes *in pari materia*. This exception to the rule was applied by this court in McCormick v. Village of West Duluth, 47 Minn. 272, 50 N. W. Rep. 128. The statute there under consideration contained independent provisions in respect to the character of certain improvement bonds which were authorized

by the act. By the first clause the bonds were to be made payable in five annual installments, the first maturing one year from date, while the second clause provided that the bonds should be made payable at the option of the village after five years, and absolutely at the expiration of seven years from their date. It was claimed that either the word "shall" appearing in each clause should be read "may," which would harmonize the two clauses and permit the municipal authorities to exercise discretion, or the clause last in order should be upheld as the later expression of the legislative will. The court said: "The rules of construction invoked by defendants' counsel in support of their demurrer are well recognized, but the true rule to be applied here is that, where the first clause of a section conforms to the obvious policy and intent of the legislature, it is not rendered inoperative by a later inconsistent clause which does not conform to this policy and intent. In such cases the later clause is nugatory and must be disregarded." This principle was recognized and applied in Dickerson v. Nelson, 4 Ind. 280, State v. Williams, 8 Ind. 191, and Sams v. King, 18 Fla. 557. In Kansas Pac. Ry. Co. v. Com'rs, 16 Kan. 587, Mr. Justice Brewer said that where there is no way of reconciling conflicting clauses, and nothing to indicate which the legislature regarded as of paramount importance, force should be given to those clauses which would make the statute in harmony with the other legislation on the same subject. The omission of the word "not" in the second section renders the statute consistent and intelligible, and in harmony with the general policy of the state as expressed in judicial decisions and general legislation upon the subject-matter of intoxicating liquors.

No attempt has heretofore been made in this state to license and control the wholesale liquor trade. "Prior to 1887," said Chief Justice Gilfillan, in State v. Orth, 38 Minn. 156, 36 N. W. Rep. 103, "the policy of the state has always been, as we belive it has been in most of the states, to require license only for the sale in small quantities, usually for consumption by the purchaser at the place where sold, to control and regulate drinking and drinking places. Nearly all the provisions of the present law (other than the section now before us) for licensing and regulating the business of selling intoxicating liquors indicate the same purpose and are inapplicable to the business of selling at wholesale." After noting the detailed provisions of the various sections and their apparent inapplicability to the sale of liquors at wholesale, the Chief Justice continues: "All the provisions of the law in regard to procuring the license, the contents of the license, and regulating the business point unequivocally to the retail trade, making sales in small quantities to consumers as the business for which a license is required; and, taking the law as a whole, we conclude the legislature did not intend to depart from the former policy of the state and require license for any but the retail trade." The act of 1887, with its various amendments (Gen. St. 1894, §§ 1990-1993) applies only to the sale of intoxicating liquors in quantities of less than five gallons—that is, to the retail liquor business; and an examination of the subsequent legislation discloses nothing which leads us to think that there has been any change of policy. The evident object of the statute under consideration is to prohibit sales in small quantities, and this intention is expressed in the first section of the act. By disregarding the word "not" in section 2 the provisions are thus made consistent, and the entire statute is brought into harmony with the general policy of the state.

The other ground assigned for reversal is that the act is not unconstitutional, in that it is in conflict with section 1, art. 3, of the state constitution, which reads as follows: "The powers of the government shall be divided into three distinct departments, legislative, executive and judicial; and no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others, except in instances expressly provided for in this constitution." The construction and application of this provision of the constitution has been frequently before this court. Sanborn v. Com'rs, Rice Co., 9 Minn. 273 (Gil. 258); *In re* App. Senate, 10 Minn. 78 (Gil. 56); Home Ins. Co. v. Flint, 13 Minn. 244 (Gil. 228); Rice v. Austin, 19 Minn. 103 (Gil. 74), 18 Am. Rep. 330; State v. Young, 29 Minn. 474, 9 N. W. Rep. 737; State v. Ueland, 30 Minn. 29, 14 N. W. Rep. 58; State v. Simons, 32 Minn. 540, 21 N. W. Rep. 750; Foreman v. Board of Co. Com'rs, 64 Minn. 371, 67 N. W. Rep. 207; McGee v. Board Co. Com'rs 84 Minn. 477, 86 N. W. Rep. 6; State v. Crosby, 92 Minn. 176, 99 N. W. Rep. 636. As a general proposition of law the legislature cannot delegate legislative powers to the judiciary or require the judges of the various courts of the state to do any acts which are not in their nature judicial. Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377, and cases there cited; Case of Supervisors of Election, 114 Mass. 247, 19 Am. Rep. 341; State v. Barker, 116 Iowa, 96, 89 N. W. Rep. 204, 57 L. R. A. 244, 93 Am. St. Rep. 222. But it is not always easy to discover the line which marks the distinction between executive, judicial, and legislative functions, and when duties of an ambiguous character are imposed upon a judicial officer any doubt will be resolved in favor of the validity of the statute, and the powers held to be judicial. Foreman v. Board Co. Com'rs, 64 Minn. 371, 67 N. W. Rep. 207. In many instances the acts which are to be done require the performance of functions, some of which are judicial and others legislative or executive, and these are often so interwoven and connected that they cannot readily be separated and distinguished. When this is the case the court will not attempt to unravel the combination, but will sustain the act as against

the constitutional objection. McGee v. Board of Co. Com'rs, 84 Minn. 477, 88 N. W. Rep. 6; State v. Crosby, 92 Minn. 176, 99 N. W. Rep. 636. In State v. Crosby, where the constitutionality of the ditch law was sustained, Mr. Justice Brown said: "The authorities are numerous sustaining statutes which impose upon the court's powers involving the exercise of both judicial and legislative functions, such as the condemnation of land for public purposes, the appointment of commissioners of election in proceedings, for adding territory to municipal corporations, and laying out and establishing highways. The proceedings provided for by the statute under consideration involve the exercise of both legislative and judicial powers. The question of the propriety or necessity of public ditches to drain marshy or overflowed lands is one of legislative character. The condemnation of land through which such ditches may be constructed, the assessment of damages, and the determination of the legal rights to parties affected, are judicial. The exercise of all these powers is involved in proceedings under this statute."

Some confusion in the authorities has resulted from the unwarranted assumption that all the functions of government must necessarily be either executive, legislative, or judicial in their nature, and therefore referred by the constitutional provision to one or the other of the three departments of government. It may very well be true that the duty imposed by a statute such as the one under consideration is neither the one nor the other. The Constitution has referred legislative power to the Legislature, executive power to the executive, and judicial power to the judiciary; but it has nowhere declared that all the powers which are necessary for the proper government of the commonwealth are included in this classification. Analyzing the constitutional provision, we find it consists of (1) a destributive clause, "The powers of government shall be divided into three distinct departments, legislative, executive and judicial;" (2) a prohibitive clause, "No person or persons belonging to, or constituting one of these departments shall exercise any of the power properly belonging to any of the others;" and (3) an exception clause, "Except in the instances expressly provided in this Constitution." The Constitution does not attempt to make an abstract distribution of governmental functions. It merely assigns such as are of recognized character to the departments which are created by it for their convenient and effective exercise.

The theory of the distribution of governmental functions is certainly as old as Aristotle (Politics, bk. 6, c. 11, § 1), and has been a controlling principle and accepted doctrine of political science since it was elaborated by Montesquieu in his Spirit of Laws. The belief in its importance was never stronger than during the latter part of the century, when our national Constitution was formed and the government established. See 1 Blk. Com. 146, 154 (Hammond's Ed. p. 362, 471); 2 Woolsey, Pol. Sci. p. 259; Maine, Prop. Gov. 219; Montesquieu, Spirit of Laws (Nugent's Trans.), book 11, c. 6; The Federalist, Nos. 47, 48, 51. But the founders were too intensely practical to be controlled by any political theory, and, while they recognized the principle in constructing the framework of the government, they violated it in practice and so distributed the powers as to create a system of checks and balances. See Mason's Veto Power. The principle formulated by Montesquieu still lies at the base of most political organizations of the present day, but during the last century the tendency of political science has been to discard it in its extreme form, because, as said by Goodnow, "It is incapable of accurate statement, and because it seems to be impossible to apply it with beneficial results in the formation of any concrete political organization. The flaw in Montesquieu's reasoning and in that of his followers was in the assumption that the expressions of the governmental power by different authorities were different powers." Goodnow, Adm. Law, 20, 21. The recent tendency of Legislatures and courts is commented on by Mr. Justice Brown in State v. Crosby, *supra*. The present attitude of the courts towards questions arising under this constitutional provision is well expressed by the Supreme Court of North Carolina: "While the executive, legislative, and supreme judicial powers of the government ought to be forever separate and distinct, it is also true that the science of government is a practical one. Therefore, while each should firmly maintain the essential powers belonging to it, it cannot be forgotten that the three co-ordinate parts constitute one brotherhood, whose common trust requires a mutual toleration of the occupancy of what seems to be a 'common because of vicinage' bordering on the domains of each." Brown v. Turner, 70 N. Car, 93, 102.

It is well to recognize the fact that "there are a multitude of governmental duties which have never been and cannot possibly be performed either by the Legislature or the Governor, and which are certainly not prescribed by the Constitution to the judiciary." Paul v. Gloucester Co., 50 N. J. Law, 610, 15 Atl. Rep. 284, 1 L. R. A. 86; Bluntschli, Theory of the State, c. 7. The constitutional provision has no application to acts of this character. It applies only to the powers which because of their nature are assigned by the Constitution itself to one of the departments exclusively. Ross v. Board of Freeholders, 69 N. J. Law, 291, 55 Atl. Rep. 310; Eckert v. Perth Amboy & W. R. Co., 66 N. J. Eq. 437, 57 Atl. Rep. 438. The powers not thus assigned remain properly under the control of the Legislature. As said by Black: "There may be cases in which a particular power cannot be said to be either executive, legislative, or judicial; and if such a power is not by the Constitution unequivocally intrusted to either the executive or judicial departments of the government, the mode of its exercise and the agency must neces-

sarily be determined by law—that is, by the Legislature." Black, Const. Law, 74. See, also, Cooley, Const. Lim. (2d Ed.) 42, 43; McClain, Const. Law in United States, § 24; Bridges v. Shallcross, 6 W. Va. 562; Field v. People, 2 Scam. (Ill.) 79; People v. Hurlbut, 24 Mich. 44, 63, 9 Am. Rep. 103.

An examination of the authorities in this country suggests the thought that in some instances the courts have assumed that the separation of the powers of government into three classes results from the application of a natural, instead of a conventional, rule. Such a theory leads to strained and artificial reasoning, and induces a system of construction which denies proper force and effect to the constitutional provision. If the powers which are conferred upon the judge of the district court and the chairman of the board of county commissioners by the act under consideration are neither necessarily executive, legislative, nor judicial, the act is not in violation of section 1, art. 3, of the Constitution of the state. The same conclusion follows, under the previous decisions of this court, if the acts to be performed are of an ambiguous character, or are in part judicial and in part executive or legislative. We therefore hold that chapter 346, p. 626, of the Laws of 1905 is effective and constitutional.

The order appealed from is affirmed, and it is ordered that the relator be remanded to the custody of the respondent.

NOTE.—*Construction of Conflicting Statutory Provisions, With a View to the Fulfillment of the Purposes of the Act Construed.*—It is a general rule of statutory construction that as between conflicting provisions of the same statutes, the last in order of arrangement will control. Hall v. Smelting Co., Fed. Cas. No. 5931; *Ex parte* Hewlett, 24 Nev. 333; Ryan v. State, 5 Neb. 276; Hand v. Stapleton, 135 Ala. 162; Westport v. Jackson, 69 Mo. App. 153; People v. Dobbins, 73 Cal. 259; Gibbons v. Brittenum, 56 Miss. 232; Calhoun Gold Mining Co. v. Mining Co., 27 Colo. 14. Thus a proviso in an act repugnant to the purview thereof is not void, but stands as the last expression of the legislative will. Townsend v. Brown, 24 N. J. Law, 80; Savings Institution v. Makin, 23 Me. 360; Farmers' Bank v. Hale, 59 N. Y. 53; Van Horn v. State, 46 Neb. 62, 64 N. W. Rep. 365. So also where positive enactments of the code are at variance with the definitions which it contains, the latter must be considered as modified by the clear intent of the former. Egerton v. New Orleans, 1 La. Ann. 435. So also where the enacting clause of the laws of Maine (1891), ch. 95, § 10, amending Rev. St. ch. 30, § 18, declares that the section as amended should provide an action of "debt" to recover the penalty for illegal transportation of game, but the section as actually amended provided for an action, "on the case," the court held that the latter provision should prevail. Howard v. Railroad Co., 86 Me. 387, 29 Atl. Rep. 1101.

But the general rule as above stated is not without its exceptions, the most important of which is that if the purpose and intent of the legislature in passing the act would be nullified by any section of the act, such section is to be rejected, or at least that construction is to be avoided which would give such section such effect. Sams v. King, 18 Fla. 557; Kansas Pacific Ry. Co. v. Wyandotte County, 16 Kan. 594; Noble v State (Iowa), 1 G. Greene, 325; Wilson v. Allen, 4 How. Prac. (N. Y.) 54; Hall v. State, 39 Fla. 637; Tabor v. Ward, 83 N. Car. 291; Treasurer of Vermont v. Clark, 19 Vt. 129; People v. McClave, 99 N. Y. 83, 1 N. E. Rep. 235. Thus in Sams v. King, *supra*, the court held that where the last clause of one section of a statute is plainly inconsistent with the first portion of the same section and with another preceding section of the statute, and this section and part of section conform to the obvious policy and intent of the legislature, the last clause, if operative at all, must be so construed as to give it an effect consistent with the other section and part of section, and with the policy they indicate. Hence, the court held on the facts in that particular case that the last clause of section 63 chapter 1976 of the laws of Florida, which provides that, "the validity of any sale for taxes under this act, or of any title acquired by, through or under such sale, shall only be affected or questioned by alleging and proving that the property sold was not subject to taxation, or that the taxes had been paid before such sale, or that the property so sold had been redeemed according to law," must be so construed as not to repeal the law in so far as it provides that until one year after the recording of the tax deed it shall be only *prima facie* evidence of regularity and title. The court said on this point: "We must give effect to the intention and purpose of the legislature in the enactment, if within legislative power. A construction which gives the latter clause of section sixty-three the effect to repeal the first part of that section and the first part of section sixty we think would be inconsistent with the policy of this and other states in the matter of statutes of this character, and independent of the question of the constitutionality of the clause construed according to its letter, our view is that the antecedent inconsistent clauses must be given effect to so limit and restrict the operation of the last clause of section sixty-three, as to permit the full operation of section sixty and the first part of section sixty-three. In other words, where the last clause of a section of a statute is plainly inconsistent with the first portion of the same section, and another preceding section and this section and part of section conform to the obvious policy and intent of the legislature, the last clause, if operative at all, must be so construed as to give it an effect consistent with the other sections and with the policy they indicate."

Supplying Omitted Words in a Statute in Order to Carry Out the Intent of the Legislature.—Not only will a court strike out a word or a clause or even a whole section of an act which is plainly inconsistent with what goes before and out of all harmony with the intent and purpose of the act, but it will also supply a word omitted, where the sense of the act without such word would be destroyed or neutralized. Nichols v. Halliday, 27 Wis. 406; Brinsfield v. Carter, 2 Ga. (2 Kelly), 143; Hutchings v. Commercial Bank, 91 Va. 63, 20 S. E. Rep. 950. In the last case cited Acts of Virginia 1877, p. 248, § 2, after providing for the separate estate of married women, curtesy, and dower, provided further, that the sole and separate estate created by any gift, grant, devise or bequest should be held according to the terms thereof, "and to the provisions and limitations of this act, so far as they are [not] in conflict therewith." The court held that the word "not," as inserted in brackets was omitted by inadvertence, and its insertion was necessary in order to effect the manifest legislative intent.

JETSAM AND FLOTSAM.

HARMON REPLIES TO ROOSEVELT.

Some time ago Mr. Judson Harmon of Ohio and Mr. F. N. Judson of Missouri, two prominent attorneys, were retained by the government to investigate the complaints made by the interstate commerce commission against the Santa Fe railroad for giving rebates contrary to law. The two gentlemen named, after a careful investigation, recommended that proceedings be taken against the officers of the road, which included Mr. Paul Morton, a friend of the president, and a member of his cabinet. The report was not received in good humor by the president, who in his acceptance of the prompt resignation of the attorneys who made the report, took occasion to argue the legal phases of the question, especially in behalf of the defense.

The president ordered proceedings to be taken against the corporation but not against any of its officers, as recommended by Messrs. Judson and Harmon. The government lost its case. Thereupon so great seemed the exultation of the president and the attorney-general at their own defeat that they issued statements proclaiming that their defeat confirmed the soundness of their position in the argument with special counsel. Mr. Harmon, one of the "special counsel," was not so chagrined by the turn in affairs that he was unable to appreciate the rich humor of the situation. In a recent interview he is reported as saying:

"The president and the attorney-general seem to be congratulating each other that the government lost its case against the Santa Fe Railroad Co. If they were always so certain there was nothing in the case, I do not understand why they turned it over to Mr. Judson and myself.

The interstate commerce commission found and reported that the company had for years flagrantly broke the law against rebates. We refused to believe that the corporation had slipped out of nights and handed over the rebates while the officers in charge were abed. We proposed to proceed against them accordingly. This course was disapproved and we thereupon resigned.

The president then proceeded himself to hold a 'bed of justice' and have a trial by letter. He announced what was a cross between a judgment of not guilty and a pardon in which the attorney-general concurred. If, after that, anybody expected anything from the further prosecution of the case, that person is now disappointed.

I do not know whether Mr. Judson and myself would have fared better or not, but I do know that it is not a good way to win a case to proclaim that one knows himself there is nothing in it, and then place it in charge of an advocate who is naturally supposed to hold the same view,

CORRESPONDENCE.

RIGHT OF MURDERER TO INHERIT FROM THE MAN HE MURDERED.

Editor of the Central Law Journal:

Enclosed I hand you a clipping from the *Topeka State Journal*, the 6th of January, 1906. This clipping explains itself. Cannot the CENTRAL LAW JOURNAL do something towards calling attention to the weakness of laws of descents and distribution, which make possible decisions, by courts of last resort, so abhorrent to every sense of justice?

Faithfully yours,

R. W. TURNER.

Mankato, Kan.

The following is the clipping sent by our correspondent:

"It was decided this morning by the supreme court that a murderer can inherit property from the person he kills. It is the first decision on this point which the court has ever been called upon to make, and its decision seems to be a reluctant one. It amounts to a recommendation to the legislature to change the existing law on the subject.

On March 14, 1903, Kate Brandt was murdered by her husband for the purpose of obtaining her property, and he is now serving a 'hang' sentence in the penitentiary. After Brandt was arrested he hired a lawyer, one G. A. Bailey, and transferred to him all his interest in his wife's estate amounting to $1,000, as pay for legal services. Mrs. Brandt's brothers and sisters, the nearest living blood relatives, claimed the estate on the ground that the husband's crime disabled him to take any part in it. The Jewell county court decided that the husband could inherit the property, in spite of his crime, and the supreme court affirms the decision.

The supreme court says: 'That anyone should be given property as a result of his crime is abhorrent to the mind of every right-thinking person, and there is strong reason why the lawmakers, in fixing the rules of inheritance and prescribing punishment for felonious homicide, should provide that no person should inherit property from one whose life he had feloniously taken. It will be observed, however, that the rule of inheritance is explicit and the statute contains no hint that anyone is to be excluded on account of misconduct or crime.'"

[The decision of the court, in spite of some authority to the contrary (Riggs v. Palmer [N. Y.], 29 Cent. L. J. 470), is in accordance with right principle and prevailing authority. Shellenberger v. Ransom (Neb.), 59 N. W. Rep. 935; Cleaver v. Life Association, 1 Q. B. 147; Owens v. Owens, 100 N. Car. 240; *In re* Carpenter's Estate (Pa.), 4 Cent. L. J. 377. The theory of the rule which in this particular case reaches a result so "abhorrent to every sense of justice," is that since most constitutions provide that no person shall be attainted of felony and that no attaindor shall work forfeiture of estate except during the life of the offender, and since the statute of descent and distribution enacts that on the death of a person his estate shall vest in his children, a son who murders his father in order to get immediate possession of his share of the father's estate becomes vested with that share. The New York court in Riggs v. Palmer, argued that equity had the right to step in and stop the hand of the murderer from reaping the result of his own wrong. Such a rule, however, presumes an even more dangerous right in a court of equity to suspend the operation of the express terms of any statute for any reason. That would be a precedent far more dangerous than the permission to a murderer to take by descent the property of the man he murdered. The remedy for the latter result is by statute, and is easily available.—EDITOR.]

BOOKS RECEIVED.

The Law of Passenger and Freight Elevators, second and revised edition. By J. A. Webb, of the St.

Louis Bar. St. Louis: The F. H. Thomas Law Book Co., 1905. Sheep, pp. 393. Price, $4.75. Review will follow.

The Encyclopædia of Evidence. Edited by Edgar W. Camp and John F. Crowe. Vols. VI. and VII. Los Angeles, Cal. L. D. Powell Company, 1905. Sheep. Review will follow.

A Treatise on the Law of Domestic Relations. By Joseph R. Long, Professor of Law in Washington and Lee University. St. Paul. Keefe-Davidson Company, 1905. Sheep, pp. 469. Review will follow.

Centralization and the Law. Scientific Legal Education. An Illustration. With an Introduction by Melville M. Bigelow, Dean of the Boston University Law School. Boston. Little, Brown and Company, 1906. Review will follow.

Brief Making and the Use of Law Books. By William M. Lile, Henry S. Redfield, Eugene Wambaugh, Alfred F. Mason, and James E. Wheeler. Edited by Nathan Abbott, Dean of the Leland Stanford, Jr., University School of Law. St. Paul, Minn.: West Publishing Co., 1906. Buckram, pp. 480. Price, $2.00. Review will follow.

The Law of Personal Injuries in Mines, including all character of personal injuries, received in and about mines and quarries, treating of injuries received by employees; action by third persons for their negligence and injuries from the negligence of independent contractors. By Edward J. White, Author of "Mines and Mining Remedies." St Louis: The F. H. Thomas Law Book Co., 1905. Sheep, pp. 724. Price, $6.75. Review will follow.

HUMOR OF THE LAW.

"Do you favor the whipping post for wife-beaters?"

"No," answered the woman who has been several times married. "The flat iron or the stovelifter is good enough for me."

Father John P. Chidwick, who was chaplain of the Maine at the time of her destruction in Havana Harbor, and who has now returned to his flock in this city, is a divine with a keen sense of humor, says the *Herald*. The "Little Father," as he was affectionately known on the Maine, carried in one of the big insurance companies the largest insurance carried by any officer in the navy. It was directly after the Maine disaster that Father Chidwick received from the company a letter, which read:

"When issuing your policy we were not aware of the hazardous nature of your calling, and therefore request that you will return to us your policy that we may insert the 'extra hazardous' clause.

Congratulating you on your escape, we are, yours," etc.

Father Chidwick replied at once:

"As your agent insured me in the wardroom of the Maine he must have known the nature of my calling, and I therefore refuse to send you back my policy.

Congratulating you on my escape, I am," etc.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCOUNTS, ACTION ON—What Constitutes Proper Book Charges.—The commission of a real estate agent held a proper book charge, recoverable in an action of book account.—Reynolds-McGinness Co. v. Green, Vt., 61 Atl. Rep. 556.

2. ACCOUNT—Prayer and Decree.—A prayer held to be only for net income of property, so that the decree was proper.—Smith's Admr. v. Smith, Vt., 61 Atl. Rep. 558.

3. ADVERSE POSSESSION—Deed to Establish Color of Title.—Where a deed is offered in evidence to show color of title, it is not necessary that its execution be proved.—Brannan v. Henry, Ala., 39 So. Rep. 92.

4. ADVERSE POSSESSION—Parol Gift.—Where adverse possession is founded upon a parol gift, the gift must be established by clear and convincing evidence, and possession must be shown to have been hostile.—Raleigh v. Wells, Utah, 81 Pac. Rep. 908.

5. ALIENS—Transmission of Title.—Under Laws 1877, p. 117, ch. 111, § 1, a grantee of a citizen who acquired title by conveyance from a nonresident alien takes good title.—McCormack v. Coddington, 95 N. Y. Supp. 46.

6. APPEAL AND ERROR—Certificate as to Statement of Facts.—On appeal from decree of divorce, statement of facts certified by the trial court to contain all the material facts held sufficient to authorize the supreme court to try the case *de novo*.—Swift v. Swift, Wash., 81 Pac. Rep. 1052.

7. APPEAL AND ERROR—Evidence as to Mental Incapacity.—Admission of evidence of total incapacity under an answer sufficient to admit evidence of defendant's weak mind, etc., held not to necessitate an amended answer.—Miller v. Tjexhus, S. Dak., 104 N. W. Rep. 519.

8. APPEAL AND ERROR—Harmless Error.—The granting of a prayer, that under the pleadings and evidence plaintiff is not entitled to recover, held not prejudicial error.—Lucente v. Davis, Md., 61 Atl. Rep. 622.

10. APPEAL AND ERROR—Issuance of Letters of Administration.—Application for grant of letters of administration assumed on appeal to have been amended to correspond with the proofs.—*In re* Long's Estate, Wash., 81 Pac. Rep. 1007.

11. APPEAL AND ERROR—Juror's Affidavit to Impeach Verdict.—A juror's affidavit which was stricken at plaintiff's request is not before the supreme court for review on plaintiff's appeal from a judgment setting

aside the verdict.—Buchanan v. Laber, Wash., 81 Pac. Rep. 911.

12. APPEAL AND ERROR—Order of Argument.—A verdict will not be disturbed because the prevailing party was erroneously permitted to open or to close, unless the defeated party has suffered substantial injustice.—Seeley v. Manhattan Life Ins. Co , N. H., 61 Atl. Rep. 585.

13. APPEAL AND ERROR—Necessity of Exceptions.—Exceptions must be taken to remarks of court to procure consideration on appeal.—Sharpton v. Augusta & A. Ry. Co , S. Car., 51 S. E. Rep. 553.

14. APPEAL AND ERROR—Refusal of Nonsuit.—If a motion for a nonsuit should have been granted when requested, yet if evidence afterwards introduced supplied the deficiency, it is not cause for reversal.—Georgia Ry. & Electric Co. v. Reeves, Ga., 51 S. E. Rep. 610.

15. APPEAL AND ERROR—Sufficiency of Complaint.—Defendant is not precluded, by a foreclosure decree rendered for plaintiff, from objecting on appeal that the complaint does not state facts entitling plaintiff to relief.—Horn v. United States Min. Co , Oreg, 81 Pac. Rep. 1009.

16. APPEAL AND ERROR—Supersedeas.—An appeal from an order denying a motion to set a cause down for trial as an equitable action, and the filing of a supersedeas bond in support of such appeal, do not deprive the trial court of jurisdiction to proceed with the action.—First Nat. Bank v. Dutcher, Iowa, 104 N. W. Rep. 497.

17. APPEAL AND ERROR—Time for Taking Writ of Error.—Where a final judgment is rendered in writing signed and dated by the judge, a writ of error must be taken within statutory period from such date.—Simmons v. Hanne, Fla., 39 So. Rep. 77.

18. APPEAL AND ERROR—Vacating Supreme Court Decree.—To warrant the supreme court in vacating decree of a former term as void because of matters *dehors* the record, the evidence should show a meritorious case.—Rumeli v. City of Tampa, Fla., 39 So. Rep. 101.

19. ATTORNEY AND CLIENT—Effect of Pending Disbarment Proceedings —The mere fact of pendency of disbarment proceedings in the state of the former domicile of an applicant for admission to the bar does not disqualify him —*In re* Hovey, Cal., 81 Pac Rep. 1019.

20. BANKRUPTCY—Appointment of Receiver.—Under Bankr. Act, ch. 541, § 3a, subd. 4, the appointment of a receiver for the property of a debtor on the application of creditors must have been made because of insolvency to constitute an act of bankruptcy.—*In re* Spalding, U. S. C. C. of App., Second Circuit, 139 Fed. Rep. 244.

21. BANKRUPTCY — Attorney's Fees. — Attorneys for creditors of a bankrupt held not entitled to fees out of the bankrupt's estate for services rendered in assisting the trustee to recover concealed property.—*In re* Felson, U. S. D. C., N. D. N. Y., 139 Fed. Rep. 275.

22. BANKRUPTCY—Machines in Bankrupt's Possession on Trial. The delivery of machines to a brankrupt for trial, to be returned within a stipulated time if unsatisfactory, otherwise to be purchased, all of which remained in the bankrupt's possession until the bankruptcy, held to have passed title to such of the machines as had been held beyond the time when they were to have been returned if unsatisfactory, but not to those which were still held on trial.—*In re* Froehlich Rubber Refining Co., U. S. D. C., E. D. Penn , 139 Fed. Rep. 201.

23. BANKRUPTCY—Powers.—Under Bankr. Act July 1, 1898, ch. 541, § 70e, 30 Stat. 565, 566 (U. S. Comp. St. 1901, p. 3452), authorizing the trustee to avoid fraudulent transfers, it is immaterial whether a transfer is made four months prior to the adjudication of bankruptcy or not.—Sharp v. Fitzhugh, Ark , 88 S. W. Rep. 929.

24. BANKRUPTCY—Preferences.—Under Bankr. Act, ch. 541, § 60, subds. a, b, it is sufficient to entitle a bankrupt's trustee to recover a preference that the facts and circumstances with reference to the debtor's financial condition, known to the creditor at the time, would have put an ordinarily prudent business man on inquiry which would have led to knowledge of insolvency.—*In re* Virginia Hardwood Mfg. Co., U. S. D. C., W. D. Ark., 139 Fed. Rep. 209.

25. BANKRUPTCY — Unrecorded Mortgage. — Under Bankr. Act, ch. 541, § 60b, defining preferences, a mortgage of property in New York, which by the law of the state is not "required" to be recorded to be valid, except as against subsequent purchasers and mortgagees in good faith, takes effect at once on its execution for the purpose of computing the four-months' period, and if executed more than four months before the bankruptcy of the mortgagor does not constitute a preference, in the absence of proof that it was withheld from record with fraudulent intent.—*In re* Hunt, U. S. D. C., N. D. N. Y , 139 Fed. Rep. 283.

26. BILLS AND NOTES—Pleading Bona Fides.—Under Negotiable Instruments Act, Laws 1897, p. 727, ch. 612, § 52, the answer in an action on a note held not to sufficiently plead that plaintiff was not a holder for value.—Rogers v. Morton, 95 N. Y. Supp. 49.

27. BROKERS—Right to Commissions.—Where a broker's authorization to sell land was in full force when the sale took place, his rights were not affected by the fact that the deed did not pass until later.—Hill v. McCoy, Cal., 81 Pac. Rep. 1015.

28. CARRIERS—Action by Shipper for Breach of Contract.—A shipper, having sold goods while in transit, held not entitled to maintain an action for breach of the contract of carriage by nondelivery.—Sweeney v. Frank Waterhouse & Co., Wash., 81 Pac. Rep. 1005.

29. CARRIERS—Common-Law Liability.—A carrier held to assume common-law liability for the delivery of goods beyond its own line, unless a limited liability bill of lading is delivered to the shipper on receipt of the goods.—Southern Ry. Co. v. Levy, Ala., 39 So. Rep. 95.

30. CARRIERS—Contributory Negligence.—Whether it was contributory negligence for a man with only one arm to attempt to board a moving train without assistance held a question for the jury.—Talbert v. Charleston & W. C. Ry. Co., S. Car., 51 S. E Rep. 564.

31. CARRIERS—Duty Toward Passengers.—A carrier is not an insurer of the safety of his passengers, but is bound only to use the utmost care and diligence.—Western Maryland R. Co. v. Shivers, Md., 61 Atl. Rep. 618.

32. CARRIERS—Liability of Connecting Carrier.—A delivering connecting carrier under a limited liability bill of lading held liable for injuries to the property occurring on its own line, or while in its possession.—Walter v. Alabama Great Southern R. Co., Ala., 39 So. Rep. 87.

33. CARRIERS—Limitation of Liability.—A carrier held not liable for a loss of cotton by fire where the cotton was shipped under a bill of lading relieving the carrier from liability for loss by fire.—Arthur v. Texas & P. Ry. Co., U. S. C. C. of App., Eighth Circuit, 139 Fed. Rep. 127.

34. CARRIERS — Pleading in Personal Injury Case. — Where passenger, lawfully leaving car, is injured by a sudden jerk of the car, it is not necessary to allege in detail by what means the jerk was caused.—Georgia Ry. & Electric Co. v. Reeves, Ga., 51 S. E. Rep. 610.

35. CONSITUTIONAL LAW—Cruel and Unusual Punishment —Pen. Code, § 246, held not unconstitutional as depriving convicts to whom it applied of their life or liberty without due process of law, or of the equal protection of the law.—*Ex parte* Finley, Cal., 81 Pac. Rep. 1041.

36. CONSTITUTIONAL LAW—Delegation of Legislative Powers.—Appropriation of money by city council "for permanent street improvements" held, under the circumstances, not so indefinite as to amount to a delegation of legislative power.—Hett v. City of Portsmouth, N. H., 61 Atl. Rep. 596.

37. CONSTITUTIONAL LAW—Limit of Indebtedness of Municipal Corporation.—Const. art. 11, § 3, prescribing the limit of municipal indebtedness, held self-executing —N. W. Halsey & Co. v. City of Belle Plaine, Iowa, 104 N. W. Rep. 494.

38. CONTRACTS — Consideration. — Where a mother deeded land to her daughter and son-in-law on agreement to support her for life, assignment of her right to certain interest under the will of her husband in consid-

eration of support was without consideration.—*In re* Casner's Estate, Cal., 81 Pac. Rep. 991.

39. CONTRACTS—Duress.—If one is in jail, and another threatens to detain him in prison for an indefinite period and prevent a trial it amounts to a threat of unlawful imprisonment.—Bailey v. Devine, Ga., 51 S. E. Rep. 603.

40 CONTRACTS—Pleadings.—To enable one to plead a contract in *hæc verba*, the instrument must show on its face all the facts which it would have been necessary to allege in pleading the legal effect.—Hill v. McCoy, Cal., 81 Pac. Rep. 1015.

41. COPYRIGHTS—Sufficiency of Notice on Fly Leaf.—A publisher's notice, printed on the page following the fly leaf of the copyrighted book, held insufficient to constitute a license agreement or contract restricting the title of purchasers.—Bobbs-Merrill Co. v. Straus, U. S. C. C., S D. N. Y., 139 Fed. Rep. 155.

42. CORPORATIONS—Action by Stockholder to Set Aside Sale.—Where one, after sale by a corporation ratified by the stockholders, buys stock not voted, held, he cannot ordinarily maintain an action to set aside the sale.—Pitcher v. Lone Pine-Surprise Consol. Min. Co., Wash., 81 Pac. Rep. 1047.

43. CORPORATIONS—By-Laws.—In the absence of legislative restriction, the propriety and character of a corporation's by-laws are to be determined by the corporation itself.—People's Home Sav. Bank v. Sadler, Cal., 81 Pac. Rep. 1029.

44. CORPORATIONS—Incumbrances.—A creditor, seeking the aid of a corporation mortgage as security must establish it as an incumbrance which the corporation could lawfully make. — Camden Safe Deposit & Trust Co. v. Citizens' Ice & Cold Storage Co., N. J., 61 Atl. Rep. 529.

45. CORPORATIONS—Minutes as Evidence in Action on Bond.—Where an instrument in the form of a note is executed by a corporation and indorsed by the stockholders, and suit is brought thereon, the minutes of the corporation held admissible to show the intent of the parties.—Somers v. Florida Pebble Phospate Co., Fla., 39 So. Rep. 61.

46. CRIMINAL LAW—Jurisdiction of Court of Appeal.—Under the constitution, giving the court of appeals jurisdiction in criminal cases on questions of law alone, where there is some evidence to sustain the verdict, its sufficiency is not reviewable.—People v. Heart, Cal., 81 Pac. Rep. 1018.

47. CRIMINAL LAW—Presumptions.—Where two persons were jointly indicted and tried separately, and on trial of the second defendant evidence was introduced that the other had been convicted, the court should have charged that such conviction created no presumption of guilt as to defendant on trial.—Mixon v. State, Ga., 51 S. E. Rep. 580.

48. CRIMINAL TRIAL—Instructions.—A headnote in the supreme court, that under the facts of a case then under consideration it was error to give a certain instruction, is not an appropriate form for the instruction in another case.—Mixon v. State, Ga., 51 S. E. Rep. 580.

49. CRIMINAL TRIAL—Presumption in Favor of Trial Court's Rulings.—All presumptions are in favor of the trial court's rulings and to call for reversal an affirmative showing of error is required, not a mere showing that under some circumstances there might have been error.—Johnson v. State, Ark., 88 S. W. Rep. 905.

50. CRIMINAL TRIAL—Reading Law to Jury. — Where during the argument counsel for accused started to read to the jury a supreme court report, it is not error for the court, while allowing the extract to be read in the hearing of the jury, to require that it be read to the court.—Godwin v. State, Ga., 51 S. E. Rep. 598.

51. CRIMINAL TRIAL — Remarks of Court. — Where a judge, asked to allow accused to supplement his statement, remarked: "Let him finish his statement. I never knew one of them to get through making his statement"—it is reversible error.—Jenkins v. State, Ga., 51 S. E. Rep. 598.

52. CUSTOMS DUTIES—Classification.—Oat-meal feed, a by-product in the manufacture of oat meal, and consisting of the broken hulls of the oats, is dutiable as "oat hulls," under paragraph 281, Schedule G, § 1, ch. 11, Tariff Act July 24, 1897, 30 Stat. 169 [U. S. Comp. St. 1901, p. 1649].—United States v. McGettrick, U. S. C. C., D. Ver., 139 Fed. Rep. 304.

53. DAMAGES—Instructions as to Earning Capacity.—That the jury may understand its duty as to reducing to cash value the amount representing the loss in earning capacity of the injured party, the court should choose language not calculated to confuse the jury by inaccuracy of expression.—Macon Ry. & Light Co. v. Mason, Ga., 51 S. E. Rep. 569.

55. DAMAGES—Money Value of Time.—What one earns in his ordinary occupation is evidence of the value of his time on the issue of damages occasioned by loss of time from such occupation.—Tullis v. McClary, Iowa, 104 N. W. Rep. 505.

56. DEDICATION—What Constitutes.—Mere opening of a passageway by a landowner over his own land held not a dedication, though such way was used by the public generally.—Loomis v. Connecticut Ry. & Lighting Co., Conn., 61 Atl. Rep. 539.

57. DEEDS—Recitals in Deeds as Evidence.—Recitals in a deed that the grantors are heirs of a former owner of the land are not competent evidence of heirship as against strangers to the deed.—Mace v. Duffy, Wash., 81 Pac. Rep. 1053.

58. DESCENT AND DISTRIBUTION—Plural Wife's Capacity to Sue.—Plural wife does not acquire the status of a wife, and is without the pale of the law of inheritance as to her husband's property.—Raleigh v. Wells, Utah, 81 Pac. Rep. 908.

59. DIVORCE—Desertion.—A letter written by a wife to her husband, stating, in response to his request for information, that she intended never to live with him again, indicates a willful desertion. — Edwards v. Edwards, N. J., 61 Atl. Rep. 531.

60. DIVORCE—Public Interest a Consideration in Support of Judgment.—Considerations in support of a judgment of dismissal in an action for divorce held required to be considered, because of public interest, though not advanced by defendant.—Gould v. Gould, Conn., 61 Atl. Rep. 604.

61. DRAINS—Failure to Give Notice of Proceedings to Establish.—Where a landowner, not notified of a drainage proceeding affecting her land, voluntarily appeared and procured the allowance of a claim for damages, all objections for failure to give notice were waived.—Ross v. Board of Sup'rs of Wright County, Iowa, 104 N. W. Rep. 506.

62. EASEMENTS—Purchase of Servient Estate.—Where the owner of a right of way appurtenant to a certain tract uses it for the period of prescription as appurtenant also to another tract, he gains a prescriptive right to such enlarged use.—Bullock v. Phelps, R. I., 61 Atl. Rep. 589.

63. EMINENT DOMAIN—Condemnation Proceedings.—Unwarranted determination of a proceeding to condemn land for highway purposes without hearing held an error only and not a jurisdictional defect.—San Luis Obispo County v. Simas, Cal., 81 Pac. Rep. 972.

64. EQUITY — Amending Bill. — Where complainant, after filing an original bill, an amended bill, an amendment to an amended bill, and the second amended bill, fails to state a case, further amendment is not as of course, but in reversing the case the bill will be ordered dismissed without prejudice.—Barco v. Doyle, Fla., 39 So. Rep. 103.

65. EQUITY—Depositions.—Petitioner for the deposition of a witness in partition suit, on filing interrogatories, should state the place of residence of the witness, as provided by Chancery Practice Rule 60, Code 1896, p. 1213.—Edwards v. Edwards, Ala., 39 So. Rep. 82.

66. EVIDENCE—Cause of Disease.—Medical expert may give his opinion as to whether resulting cerebral meningitis would have been caused by injuries received

in a certain case.—Birmingham Ry., Light & Power Co. v. Enslen, Ala., 39 So. Rep. 74.

68. EVIDENCE—Extent of Warranty as to Quality.—A written warranty of the quality of an article cannot be enlarged by proof of parol warranty of quality made before the written warranty was made.—Houghton Implement Co. v. Doughty, N. Dak., 104 N. W. Rep. 516.

69. EVIDENCE—Presumptions as to Meetings and Adjournments of Common Council.—In the absence of affirmative proof to the contrary, it will be presumed that the meetings and adjournments of the common council of a city were regular.—Dunaway v. City of Portland, Oreg., 81 Pac. Rep. 945.

70. EVIDENCE—Restriction of Sale on Copyrighted Book.—Statement contained in catalogues and bills for books sold rendered to the purchasers for sale at retail held not to constitute a limitation or restriction of the title to the books.—Scribner v. Straus, U. S. C. C., S. D. N. Y., 139 Fed. Rep. 193.

71. EXECUTION—Injunction on Ground of Mistake in Judgment.—One held not entitled to relief by injunction against execution on a judgment by confession entered by mistake, where but for the negligence of himself or attorney it would not have been entered.—Hearn v. Canning, R. I., 61 Atl. Rep. 602.

72. EXECUTORS AND ADMINISTRATORS—Accounting.—Beneficiaries cannot object to the executor's account on the ground that they received some part of the estate which should have gone to another.—*In re* Casner's Estate, Cal., 81 Pac. Rep. 991.

73. EXECUTORS AND ADMINISTRATORS—Personal Liability.—An executor not limiting his liability held personally liable on a contract for services for benefit of the estate.—Reynolds-McGinness Co. v. Green, Vt., 61 Atl. Rep. 556.

74. EXECUTORS AND ADMINISTRATORS—Revocation of Letters on Finding Will.—Where, after letters of administration have been issued, a will is found, the register of wills can revoke the letters and admit the will to probate.—*In re* Kern's Estate, Pa., 61 Atl. Rep. 578.

75. FACTORS—Departure from Instructions and Subsequent Ratification.—Wool grower held to have waived and ratified any departure by factor from instructions as to sale and care of wool.—Allen v. McAllister, Wash., 81 Pac. Rep. 927.

76. FEDERAL COURTS—Comity.—Where a state court granted plaintiff permission to sue its receiver in any court of competent jurisdiction, comity did not prevent the federal courts from assuming jurisdiction, the necessary jurisdictional facts appearing.—James Freeman Brown Co. v. Harris, U. S. C. C. of App., Fourth Circuit, 139 Fed. Rep. 105.

77. FERRIES—Liability of Ferryman.—A ferryman becomes responsible for the safety of a team which undertakes to use the ferry as soon as the operator of the ferry directs the driver of the team to drive upon the ferryboat.—Wilson v. Alexander, Tenn., 88 S. W. Rep. 935.

78. FIRE INSURANCE—Insurable Interest.—Both a purchaser of real estate on which insured buildings were situated and a mortgagee thereof held to have an insurable interest therein, as defined by Civ. Code, § 2546.—Loring v. Dutchess Ins. Co., Cal., 81 Pac. Rep. 1025.

79. FIXTURES—Landlord and Tenant.—A lessee, having taken a new lease without a covenant authorizing removal of trade fixtures which had became a part of the freehold, held not entitled to remove them on expiration of second lease.—Wadman v. Burke, Cal., 81 Pac. Rep. 1012.

80. FRAUDULENT CONVEYANCES—Insolvency.—In a suit by firm creditors to set aside alleged fraudulent conveyances of individual property by the partners, the burden is on plaintiffs, not only to show fraud, but the insolvency of the firm.—Holmes Bros. v. Ferguson-McKinney Dry Goods Co., Miss., 39 So. Rep. 70.

81. HOMESTEAD—Rents and Profits.—Where legal title to homestead is in wife, she is entitled to the rents and profits against creditors of husband.—Sharp v. Fitzhugh, k., 88 S. W. Rep. 929.

82. HOMICIDE—Instructions.—There was no error in refusing an instruction that, if the homicide would have been excusable if the shot had killed the man, the shooting at him without killing is also excusable.—Mixon v. State, Ga., 51 S. E. Rep. 580.

83. HUSBAND AND WIFE—Plural Wife's Capacity to Inherit.—A plural wife may accept a gift of her husband's property or may acquire title to real estate of her husband by adverse possession founded on a gift.—Raleigh v. Wells, Utah, 81 Pac. Rep. 908.

84. INDICTMENT AND INFORMATION—Misdemeanor.—It is not essential that an accusation in the county court of a misdemeanor charge the commission of the crime on the same day as that alleged in the warrant on which the accusation was based.—Shivers v. State, Ga., 51 S. E. Rep. 596.

85. INJUNCTION—Police Officers Patrolling Entrance of Disorderly House.—Police officers held entitled to patrol a common entrance to a court occupied by plaintiff's restaurant and by certain disorderly houses (Pen. Code, §§ 315, 316, 647).—Pon v. Wittman, Cal., 81 Pac. Rep. 984.

86. INSANE PERSONS—Judgment where One of the Parties is Insane.—Where a case had been tried, submitted, and a verdict returned, it was no objection to the signing of the findings and judgment that at that time one of the parties was insane.—San Luis Obispo County v. Simas, Cal., 81 Pac. Rep. 972.

87. JUDGMENT—Death of Appellant Pending Appeal.—Where appellant died pending appeal, the enforcement of the judgment in case of affirmance was primarily within the jurisdiction of the court having charge of appellant's estate.—People's Home Sav. Bank v. Sadler, Cal., 81 Pac. Rep. 1029.

88. JUDGMENT—Joint Defendants.—In a joint action against several defendants, some of whom successfully plead limitations, dismissal as to all will not be disturbed.—Somers v. Florida Pebble Phosphate Co., Fla., 39 So. Rep. 61.

89. JUDGMENT—Ruling on Demurrer Res Judicata.—After a judge has overruled a demurrer to a petition, he cannot at a subsequent term review such ruling, and should not in his charge give defendant the benefit of the defense set up in the demurrer, since the questions are *res judicata*.—Sims v. Georgia Ry. & Electric Co., Ga., 51 S. E. Rep. 573.

90. JURY—Excusing Juror.—The act of the court in excusing, over the objection of defendant, a juror who is not in fact disqualified, held not available error on appeal from a conviction.—People v. Lee, Cal., 81 Pac. Rep. 969.

91. JURY—Qualifications of Juror.—That a juror was married to a daughter of a half sister of one of defendant's secret service employees, which fact if known would have induced the exercise of a peremptory challenge, held immaterial.—Hern v. Southern Pac. Co. Utah, 81 Pac. Rep. 902.

92. LANDLORD AND TENANT—Injury to Licensee.—A landlord held liable to one lawfully present on rented premises by invitation of a tenant for injuries caused by failure to keep the premises in repair.—Ross v. Jackson, Ga., 51 S. E. Rep. 578.

93. LIBEL AND SLANDER—Words Actionable Per Se.—Words charging a tenant with the theft of certain articles from his landlord held slanderous, as imputing larceny, in the absence of evidence that the articles were attached to the freehold.—Shockey v. McCauley, Md., 61 Atl. Rep. 588.

94. LIFE ESTATES—Adverse Possession.—Adverse possession does not begin to run against the remaindermen until the death of the life tenant on which their remainder is expectant.—McCormack v. Coddington, 95 N. Y. Supp. 46.

95. MANDAMUS—To Compel Municipality to Pay Judgment.—*Mandamus* will not be granted to compel municipal authorities to levy a tax to pay a judgment, where the judgment is not valid.—E. J. Meyer & Co. v. Jordan Ga., 51 S. E. Rep. 602.

96. MASTER AND SERVANT—Presumptions as to Neg

ligence.—Where servant is found dead at his work, presumption of freedom from contributory negligence held balanced by presumption of freedom from negligence on part of master.—Allen v. Kingston Coal Co., Pa., 61 Atl. Rep. 572.

97. MASTER AND SERVANT—Safe Place to WORK.—A servant working in a place where he does not assume the risk cannot be deemed guilty of contributory negligence in working in such place.—Hall v. West & Slade Mill Co., Wash., 81 Pac. Rep. 915.

98. MINES AND MINERALS—Miner's Liens.—Under the miner's lien statute, the filing of a claim within the time prescribed by the statute is a condition precedent to the preservation of the lien.—Horn v. United States Min. Co., Oreg., 81 Pac. Rep. 1009.

99. MINES AND MINERALS—Surface Support.—Owner of mineral estate owes to the owner of surface a servitude of sufficient support.—Madden v. Lehigh Valley Coal Co., Pa., 61 Atl. Rep. 559.

100. MORTGAGES—Parties in an Action to Set Aside.—A decree setting aside a mortgage satisfaction agreement and ordering a sale of the mortgagor's interest under a proceeding to which the mortgagor is not a party will be set aside.—Barco v. Doyle, Fla., 39 So. Rep. 103.

101. MORTGAGES—Redemption.—One who has *bona fide* bought and assumed possession of mortgaged property before foreclosure to which he is not a party may redeem from the sale.—Licata v. De Corte, Fla., 39 So. Rep. 58.

102. MUNICIPAL CORPORATIONS—Defective Sidewalks.—A city held liable for injury from a defective sidewalk, though it was put in by private parties.—McKnight v. City of Seattle, Wash., 81 Pac. Rep. 998.

103. MUNICIPAL CORPORATIONS—Ordinance Respecting the Removal of Garbage.—City of Oakland held to have jurisdiction to pass an ordinance providing for the exclusive collection of garbage by the city, and imposing a small fee on the public therefor.—*Ex parte* Zhizhuzza, Cal., 81 Pac. Rep. 955.

104. MUNICIPAL CORPORATIONS — Reassessment for Local Improvements.— Where minutes of meeting of city council were silent as to disposition of objections to a reassessment, it will be presumed that they were considered and found without merit.—Duniway v. City of Portland, Oreg., 81 Pac. Rep. 945.

105. MUNICIPAL CORPORATIONS—Use of Appropriated Funds.—Where license money is appropriated for street improvements it is not necessary that the identical money be kept on hand, or that the contractor see to it that such money is not used for other purposes.—Hett v. City of Portsmouth, N. H., 61 Atl. Rep. 596.

106. NEGLIGENCE—Contributory Negligence Question for Jury.—Where, in an action for injuries through negligence, fair-minded men may draw from the acts different conclusions, the question of contributory negligence is for the jury.—St. Louis, I. M. & S. Ry. Co. v. Hitt, Ark., 88 S. W. Rep. 908.

107. NEGLIGENCE—Injury to Pedestrian by Stone Falling from Building.—In an action for death of pedestrian by fall of stone from building in process of erection, admission of evidence of ordinance requiring shed to be erected over pavement held not error. — Riegert v. Thackery, Pa., 61 Atl. Rep. 614.

108. PARENT AND CHILD — Emancipation.—A father's emancipation of his son before majority may be in writing, by parol, or may be proved by circumstantial evidence or implied from conduct.—Bristor v. Chicago & N. W. Ry. Co., Iowa, 104 N. W. Rep. 487.

109. PARENT AND CHILD — Enticement of Child.—In order that a parent may maintain an action for the enticement of a minor son from the parent's service, there must have been an actual service and some affirmative detraction by defendant.—Kenney v. Baltimore & O. R. Co., Md., 61 Atl. Rep. 581.

110. PARTIES—Misnomer Waived by Pleading to Merits.—Where, in a civil case, defendant is described by a wrong name, but pleads to the merits by the true name, the error is waived.—McIntosh County Comrs. v. Aiken Canning Co., Ga., 51 S. E. Rep. 585.

111. PARTNERSHIP—Individual Assets.—Members of a firm are entitled to dispose of their individual property as they see fit, if there is sufficient partnership assets to satisfy firm debts.—Holmes Bros. v. Ferguson-McKinney Dry Goods Co., Miss., 39 So. Rep. 70.

112. PARTNERSHIP—What Constitutes. —Person who furnished logs to a sawmill and received his pay from the manufactured product held not liable for the obligations of one of the owners of the sawmill.—Michener v. Fransham, Mont., 81 Pac. Rep. 953.

113. PHYSICIANS AND SURGEONS—What Constitutes Dentistry Practice.—Certain acts held to constitute practice of dentistry within the meaning of the statute regulating such practice.—State v. Newton, Wash., 81 Pac. Rep. 1002.

114. PRINCIPAL AND AGENT — Authority of Agent to Waive Conditions of Contract.—An agent having authority to sell a machine under a contract which contains conditions for the benefit of the seller has authority to bind his principal by a waiver of such conditions.—First Nat. Bank v. Dutcher, Iowa, 104 N. W. Rep. 497.

115. PRINCIPAL AND SURETY—Rights of Surety.—Independent of statute, a creditor cannot be compelled to exercise his remedy against the principal before resorting to the surety.—Dampskibsaktieselskabet Habil v. United States Fidelity & Guaranty Co., Ala., 39 So. Rep. 54.

116. PRINCIPAL AND SURETY—Suing Undisclosed Principal for Money Loaned.—If one loans money to another on his own credit, and takes a note under seal, the lender cannot thereafter disregard the note and sue a third person for the money loaned.—Van Dyke v. Van Dyke, Ga., 51 S. E. Rep. 582.

117. QUIETING TITLE—When Suit Lies.—A bill to remove a cloud does not lie against a defendant having possessed himself of certain lands, having leased others, and otherwise attempting to exercise control of all the lands.—Barco v. Doyle, Fla., 39 So. Rep. 103.

118. RAILROADS—Trespassers.—In an action for injuries to plaintiff while about defendant's railroad yard, an instruction that, if plaintiff was a mere "loiterer" about defendant's station after termination of his employment, etc., he was a trespasser, held not error.—Hern v. Southern Pac. Co., Utah, 81 Pac. Rep. 902.

119. SALES—Breach of Warranty.—The seller of a machine held to have waived a requirement of the contract of sale as to the giving of written notice of failure of the machine to satisfy a warranty. — First Nat. Bank v. Dutcher, Iowa, 104 N. W. Rep. 497.

120. SALES—Construction as to Warranty.—Conditions in a contract of sale limiting the liability of the seller on a warranty are to be strictly construed against him.—First Nat. Bank v. Dutcher, Iowa, 104 N. W. Rep. 497.

121. SALES—Implied Warranty.—A seller of certain cotton held not liable on an implied warranty that the cotton was of the grade implied from the description.—Hartin Commission Co. v. Pelt, Ark., 88 S. W. Rep. 929.

122. SALES—Passing of Title.—On sale of 70 bushels of flax mixed with flax of like quantity and grade, the fact that there has been no separation from the mass will not prevent the title from passing.—O'Keefe v. Leistikow, N. Dak., 104 N. W. Rep. 515.

123. SALES—Practical Construction.—Where a contract had been construed by the parties only to require the seller to take a *pro rata* amount for a part of the first year ending September 1, 1898, the seller could not claim a breach by failure to take a year's contract amount prior to that time.—Baldwin v. Napa & Sonoma Wine Co., Cal., 81 Pac. Rep. 1037.

124. SALES—Sale by Sample.—Where there is a sale by sample and not by description merely, title does not pass absolutely until there has been an opportunity for inspection.—Gardiner v. McDonogh, Cal., 81 Pac. Rep. 964.

125. SALVAGE—Amount of Compensation.—An award of $2,000 made to the owners and crew of a tug for salvage services rendered in towing to port a disabled and leaking schooner worth, with cargo, $50,000, which was in-

jured by striking the jetty at the entrance to Gray's Harbor, Wash.—The South Bay, U. S. D. C., W. D. Wash., 139 Fed. Rep. 273.

126. SHERIFFS AND CONSTABLES—Attachment.—In an action by a successful attachment defendant against a sheriff to recover moneys collected by the latter under the attachment, burden held on such defendant to show that the money belonged to himself.—Michener v. Franham, Mont., 81 Pac. Rep. 953.

127. SHERIFFS AND CONSTABLES — Individual Torts.—Constable who while engaged in levying a writ of *fieri facias* assaults a stranger commits a personal tort, for which his sureties are not responsible. — State v. Dayton, Md., 61 Atl. Rep. 624.

128. SPECIFIC PERFORMANCE—After Acquired Title.—A vendee held entitled to specific performance on the vendor acquiring title after making the contract, though the contract provided that the vendor should return the purchase money if he failed to give title.—Showalter v. Sorensen, Wash., 81 Pac. Rep. 1054.

129. SPECIFIC PERFORMANCE—Right to Relief.—Specific performance of contract for sale of land would not be enforced against ignorant foreigner who did not understand the transaction.—Miller v. Tjexhus, S. Dak., 104 N. W. Rep. 519.

130. STATES—Members of Legislature. — Under Const. art. 3, § 5, ineligibility of senator or member of the house of representatives to any civil office in the state that has been created or the emoluments whereof shall have been increased during his term continues during the entire time for which he was elected, and he cannot render himself eligible by resigning from legislature.—*In re* Members of Legislature, Fla., 39 So. Rep. 63.

131. STATUTES—Invasion of Pardoning Power. — Unconstitutionality of Workhouse Law, § 18 (Shannon's Code, § 7423), relative to commutation of sentence, held not to affect the validity of the balance of the act.—Fite v. State, Tenn., 88 S. W. Rep. 941.

132. STREET RAILROADS—Injury to Intoxicated Person on Track.—In action for injuries to plaintiff on street car track, defendant may show plaintiff's intoxication at the time.—Sharpton v. Augusta & A. Ry. Co., S. Car., 51 S. E. Rep. 553.

133. STREET RAILROADS—Powers of Commissioners.—Under the statute authorizing appeals to the superior court from the action of railroad commissioners, the court has power to direct the commissioners to exercise their equitable powers in disposing of an appeal to them from a decision of municipal authorities. — Appeal of City of Waterbury, Conn., 61 Atl. Rep. 547.

134. TAXATION—Burden of Showing Erroneous Assessment.—Where there was no assessment of a corporation's easements in certain streets, it was error to declare that the burden was on the corporation to show by a preponderance of testimony that the assessment was erroneous.—Consolidated Gas Co. of Baltimore City v. City of Baltimore, Md., 61 Atl. Rep. 532.

135 TAXATION—Exemptions.—No person or property is impliedly exempt from taxation, and statutory exemptions are strictly construed against the claimant.—*In re* Deutsch's Estate, 95 N. Y. Supp. 65.

136. TIME—Where Last Day Falls on Sunday —In computing time within which an act required must be done, if the last day falls on Sunday it cannot be excluded, unless the intent of the legislature to exclude it is manifest.—Simmons v. Hanne, Fla., 39 So. Rep. 77.

137. TRADE MARKS AND TRADE NAMES—Rights Governed by Contract.—Where the parties have settled their respective rights to the use of a name on their goods by a contract, one cannot ignore such contract and maintain a suit for unfair competition.—Von Faber-Castell v. Faber, U. S. C. C. of App., Second Circuit, 139 Fed. Rep. 257.

138. TRADE MARKS AND TRADE NAMES—Unfair Competition.—Defendant, having appropriated certain letters previously used by complainant to designate its hoof pad, held not entitled to the exclusive use of such letters by having registered them as a trade-mark.—Revere Rubber Co. v. Consolidated Hoof Pad Co., U. S. C. C., S. D. N. Y., 139 Fed. Rep. 151.

139. TRESPASS—Malicious Destruction of Property.—One held liable for willful and malicious destruction of fish nets in a navigable river, not obstructing navigation, even if no authority to maintain them was obtained.—Fowler v. Harrison, Wash., 81 Pac. Rep. 1055.

140. TRESPASS— Wrongful Removal of Building from Land.—The owner held entitled to recover damages for wrongful removal of a building from land, though the mortgage thereon, and what he owes for labor and material for its construction, exceeds its value.—Kunkel v. Utah Lumber Co., Utah, 81 Pac. Rep. 897.

141. TRIAL—Exclusion of Witnesses.—Where witnesses have been excluded, it is discretionary with the court to allow witness who remained in the room to testify.—Sharpton v. Augusta & A. Ry. Co., S. Car., 51 S. E. Rep. 553.

142. TRIAL—Instructions.—Where the court instructs on all the material issues, it is not error to refuse a request unless error is shown.—Hansen v. Haley, Idaho, 81 Pac. Rep. 935.

143. TRIAL—Pleading.—Where a plea is bad, a prayer that "under the pleadings and evidence" there is no legally sufficient evidence to entitle plaintiff to recover should ordinarily be refused.—Lucente v. Davis, Md., 61 Atl. Rep. 622.

144. TRUSTS—Enforcement.—Complainant, in a suit to enforce a trust contained in the will of her father, held not charged with notice thereof by the recording of such will in a state other than that in which complainant was raised.—Mullen v. Walton, Ala., 39 So. Rep. 97.

145. TRUSTS—Sale of Property.—Ordinarily a court of equity will sanction a sale made by a trustee in exercising a power conferred upon him, if such power is fairly exercised.—Bertron, Storrs & Griscom v. Polk, Md., 61 Atl. Rep. 616.

146. WATERS AND WATER COURSES — Boundaries as Governed by Meander Line. — Meander line is not a boundary line, if the surveyed tract actually abuts upon a body of water proper to be meandered; but, if there is no such body of water, the meander line limits the title of the owner.—Wright v. City of Council Bluffs, Iowa, 104 N. W. Rep. 492.

147. WATERS AND WATER COURSES—Mill Privileges.—Where various mill privileges at a dam are possessed in common by the respective owners thereof, but are subject to priorities between themselves, each owner must exercise his rights reasonably in view of the rights of the other owners.—Berry v. Hutchins, N. H., 61 Atl. Rep. 550.

148. WATERS AND WATER COURSES — Withholding Water from Subscriber to Irrigation Company.—A stockholder in irrigation company held not entitled to restrain the company from withholding water from his land before he paid assessments on his stock.—Curtin v. Arroyo Ditch & Water Co., Cal., 81 Pac. Rep. 982.

149. WITNESSES — Communications to Attorney. — Where an attorney acts for both parties to a negotiation, he is a competent witness as to communications in presence of both.—Mitchell v. Mitchell, Pa., 61 Atl. Rep. 570.

150. WITNESSES—Questions Assuming Facts.—A question asking defendant how much land he bought in a certain section was objectionable in that it assumed that defendant bought land in such section.— Brannan v. Henry, Ala., 39 So. Rep. 92.

151. WITNESSES—Reading Letter which Witness Denied Writing.—Where witness testifies that he did not write a certain letter, it cannot be read to him to ask if he did not write it.—Sharpton v. Augusta & A. Ry. Co., S. Car., 51 S. E. Rep. 553.

152. WITNESSES—Testimony when not Sworn.—Where a witness is allowed to testify in the presence of defendant or his counsel without objection, though not under oath, it is a waiver of the omission.—Southern Ry. Co. v. Ellis, Ga., 51 S. E. Rep. 594.